Supreme Court, U.S.
FILED
AUG 30 2004
OFFICE OF THE CLERK

(3)

No. 03-1716

In the Supreme Court of the United States

THE LURIE COMPANY (221 N. LASALLE, CHICAGO, ILLINOIS),

Petitioner,

v.

COOK COUNTY BOARD OF REVIEW,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID K. SCHMITT
Counsel of Record
LEONARD W. GOLAN
FIELD & GOLAN LLP
70 West Madison Street
Suite 1500
Chicago, IL 60602-4206
(312) 263-2300

Attorneys for Petitioner, The Lurie Company (221 N. LaSalle Street, Chicago)

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Lurie Did Not Waive Its Federal Due Process Claim. 1

II. This Case Presents A Federal Question. 6

CONCLUSION 9

TABLE OF AUTHORITIES

Federal Cases Cited: **PAGE(S)**

Adams v. Robertson,
520 U.S. 83 (1987) 5

Braniff Airways v. Nebraska State Bd. of Equalization and Assessment,
347 U.S. 590 (1954) 5

Brinkerhoff-Farris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 3, 8

Eddings v. Oklahoma,
455 U.S. 104 (1982) 4

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 6, 7, 8

New York ex rel. Bryant v. Zimmerman,
278 U.S. 63 (1928) 4

Richards v. Jefferson County, Ala.,
517 U.S. 793 (1996) 3, 8

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 4-5

State Cases Cited:

Cook County Bd. of Review v. Property Tax Appeal Bd., 803 N.E.2d 55 (Ill. App. Ct. 2003) ..... *passim*

Cook County Bd. of Review v. Property Tax Appeal Bd., 791 N.E.2d 8 (Ill. App. Ct. 2002) 4, 6

People ex rel. Devine v. Murphy, 693 N.E.2d 349 (Ill. 1998) 6

Federal Constitutional Provisions and Statutes Cited:

U.S. CONST., amend V ..... *passim*

U.S. CONST., amend XIV ..... *passim*

28 U.S.C.A. § 1257(a) 1

State Constitutional Provisions, Statutes and Regulations Cited:

ILL. CONST., art. IX, § 4 1-2

ILL. S. CT. RULE 315(b) 3

86 ILL. ADMIN. CODE tit. 86 § 1910.66(b) (Conway Greene CD-Rom 2002) 8-9

35 ILL. COMP. STAT. ANN.
200/16-180 (West Supp. 2004) 7, 8

35 ILL. COMP. STAT. ANN.
200/16-185 (West 2002) 9

ARGUMENT

The Board[1] does not challenge the merits of Lurie's due process claim. Instead, the Board argues that this Court lacks jurisdiction under 28 U.S.C.A. §1257(a), for two reasons. First, according to the Board, Lurie waived its due process claim by not presenting it appropriately below. Second, the Board asserts that this case does not present a federal question. Both of the Board's arguments are without merit.

I. Lurie Did Not Waive Its Federal Due Process Claim.

The Board of Review's primary argument is that Lurie waived its federal due process claim by not raising it in the state courts. (Opp. at 6.) The plain facts defeat this assertion:

- On July 13, 1998 and July 12, 1999, the Board of Review, following hearings that generated no reviewable record, issued one-sentence rulings denying Lurie's request for real property valuation reductions for the years 1997 and 1998. (App. at 1-6.)

- On appeal from the Board's rulings, the Illinois PTAB, on August 2, 2001, unanimously held that the evidence presented to the PTAB warranted a valuation reduction (App. at 7, 32, 49-50), and, further, that the proper level of assessment was not 38% of market value, but rather 25%, pursuant to article IX, section 4 of the Illinois Constitu-

---

[1] The same shorthand references used in Lurie's Petition are used herein. The Board's Brief in Opposition to Petition for Writ of *Certiorari* is hereinafter referred to as "Opp.".

tion, which requires that the level of assessment for the highest class of property be no greater than two and one half times the level of the lowest class ("Constitutional Ratio"). (App. at 7, 39, 43, 49-50.)

- On December 16, 2003, the Appellate Court held[2] that Lurie had waived the state constitutional issue by failing to present it to the Board back in 1998 and 1999, thus retroactively changing existing law and depriving Lurie of its opportunity to present its state constitutional claim. (App. at 51-61.) It is this decision that first gave rise to the federal due process claim raised by Lurie in its Petition to this Court.

- Finally, on March 26, 2004, the Illinois Supreme Court issued an Order denying the PTAB's and Lurie's respective Petitions for Leave to Appeal ("PLA") from the Appellate Court's decision. Lurie's PLA to the Illinois Supreme Court raised the federal due process issue Lurie presents herein.

This procedural history shows that immediately following the Appellate Court's decision, which is the basis for Lurie's federal due process claim, Lurie raised the due process issue in its PLA filed with the Illinois Supreme Court. (Petition, at 6) (citing App. at 165, 168, 170, 185.) Lurie had no reason or right to raise the federal due process question prior to its PLA because the violation of its due process rights was occasioned by the Appellate Court's decision.

---

[2] *Cook County Bd. of Review v. Property Tax Appeals Bd.*, 803 N.E.2d 55 (Ill. App. Ct. 2003).

Lurie's predicament is directly analogous to that which faced the taxpayers in the two decisions by this Court on which Lurie's Petition primarily relies, *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) and *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) (Petition at 12, 16-18). In both of those cases, this Court found that a taxpayer's federal due process rights were violated when a state court changed the law without notice, and then retroactively applied it to a taxpayer who had followed previously existing law. *See Brinkerhoff*, 281 U.S. at 677-78; *Jefferson County*, 517 U.S. at 797. That is exactly what happened to Lurie here.[3]

In a strained attempt to distinguish *Jefferson County* and *Brinkerhoff*, the Board assigns undue significance to the fact that Lurie did not file a petition for rehearing either before the Appellate Court or the Illinois Supreme Court. (Opp. at 10.) However, Lurie had no obligation to do so. After the Appellate Court issued its opinion, Lurie had the option of either filing a PLA with the Illinois Supreme Court or filing a petition for rehearing with the Appellate Court. *See* ILL. SUP. CT. R. 315(b). Lurie chose the former, and, as stated above, raised the federal due process question in its PLA. (Petition, at 6) (citing App. at 165, 168, 170, 185.) After the Illinois Supreme Court denied its PLA, Lurie acted correctly again by raising the due process issue in its Petition to this Court. Thus, contrary to the Board's argument, Lurie followed the Illinois Supreme Court Rules and properly preserved the issue for review by this Court. *Jefferson County* and *Brinkerhoff* squarely apply here.

---

[3] The Illinois General Assembly recently passed legislation that made clear that the Appellate Court's decision misapplied existing law. *See* discussion pp. 7-8 *infra*.

The Board also argues that Lurie should not have been "surprised" by the Appellate Court's waiver ruling below because, after Lurie's appeal was fully briefed, the Appellate Court issued a decision in a different case, *Cook County Bd. of Review v. Property Tax Appeal Bd.*, 791 N.E.2d 8 (Ill. App. Ct. 2002) (sometimes referred to as "*Bosch*"). (Opp. at 11.) This argument misses the point. As the procedural history outlined above shows, the critical Board of Review hearings, where the waiver was held to have occurred, transpired in 1998 and 1999—four and three years before *Bosch*. *See* discussion pp. 1-2 *supra*. The fact that Lurie knew about *Bosch* before the Appellate Court's ruling in Lurie's case is irrelevant because that knowledge still came years after Lurie had any opportunity to comply with the new rule.

The Board also argues that Lurie waived its due process claim by "vaguely invok[ing]" the issue in its PLA to the Illinois Supreme Court. (Opp. at 7-9.) Again, the Board is incorrect. Precedents of this Court make clear that, in framing the federal question for presentation to the state court, a litigant must simply bring the federal claim and the grounds therefor to the state court's attention. For example, in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court stated that, "[I]f the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." Similarly, in *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982), this Court, citing *Zimmerman*, held that a specific question regarding the Eighth Amendment to the United States Constitution was properly before it even though the question had been presented to the state court in general rather than precise terms. In so holding, this Court remarked, "our jurisdiction does not depend on citations to book and verse." So too, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159

n. 5 (1980), this Court held that a generalized "due process" argument addressed to the "Florida Constitution and its Federal counterpart" was "a sufficient base for this Court's consideration of the federal issue." *See also Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590, 598-99 (1954).[4]

Here, Lurie specifically identified a federal due process issue in its PLA to the Illinois Supreme Court. (Petition, at 6) (citing App. at 165, 168, 170, 185.) Lurie also argued, at length, the fundamental unfairness of the Appellate Court's decision that gave rise to the federal due process issue. (*Id.*) Under the precedents of this Court cited immediately above, that was sufficient to provide this Court with jurisdiction to consider Lurie's claim.

For all of these reasons, this Court should reject the Board's argument that Lurie waived its federal due process claim.[5]

---

[4] The main authority on which the Board relies in support of its argument that Lurie failed to raise the federal due process issue with sufficient specificity is *Adams v. Robertson*, 520 U.S. 83 (1987). (Opp. at 7-9.) *Adams* is readily distinguishable, for two reasons. First, the petitioner in *Adams* failed to cite to the United States Constitution in the record below. *See Adams*, 520 U.S. at 89 n. 3. Second, the petitioner in *Adams* filed a petition that contained no citations to the record below, and instead merely directed this Court's attention generally to eighty pages of trial court papers contained in the joint appendix. *See id.* The matter *sub judice* does not suffer from either of those defects. (App. at 165, 168, 170, 185.)

[5] In its Statement of the Case, the Board also asks this Court to ignore pages 109-150 in Lurie's Appendix. Pages 109-118 of the Appendix consist of Lurie's original 1997 and 1998 Complaints before the Board from which this Petition stems and, therefore, are necessarily a part of the record below and were

(continued...)

II. This Case Presents A Federal Question.

The Board of Review also argues that the Appellate Court's decision involves only questions of Illinois law which the Appellate Court correctly applied, and that no federal due process issue exists. In the alternative, the Board asserts that the Appellate Court's decision could be upheld on independent state law grounds. The Court should reject these arguments for several reasons.

As a threshold matter, it is well-established that the Fourteenth Amendment to the United States Constitution prevents states from denying potential litigants the use of established adjudicatory procedures when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982). That is precisely what happened here. The new rule that litigants were required to raise state constitutional arguments before the Board of Review was not announced until 2002, in *Bosch*. The rule was then applied *ex post facto* to hold that Lurie waived its state constitutional claims by not raising them in hearings before the Board of Review in 1998 and 1999. As a result, neither the Appellate Court nor the Illinois Supreme Court has ever granted Lurie a hearing on the issue of

---

(...continued)
included in the appeal to the PTAB. Pages 119-150 of the Appendix consist of an annual published review of the Board. This annual review is an updated highlight of the statistics which are already incorporated into the Illinois Supreme Court decision in *People ex rel. Devine v. Murphy*, 693 N.E.2d 349, 356 (Ill. 1998), cited on page 14 of Lurie's Petition and, thus, is incorporated by reference. The annual review was included in the Appendix for the convenience of this Court and is not necessary to support Lurie's argument.

whether, as the PTAB held, Lurie's rights under the Constitutional Ratio provision were violated. Under *Logan*, this constitutes a federal due process violation.

Furthermore, there can be no doubt that the Appellate Court's application of Illinois law was incorrect. The Illinois General Assembly recently amended the Illinois Property Tax Code to clarify what Lurie and every other practitioner before the PTAB understood to be the law all along:

> ***[A]ll appeals shall be considered de novo*** and the Property Tax Appeal Board ***shall not be limited to the evidence presented to the board of review of the county***. A party participating in the hearing before the Property Tax Appeal Board is entitled to introduce evidence that is otherwise proper and admissible ***without regard to whether that evidence has previously been introduced at a hearing before the board of review of the county***.

35 ILL. COMP. STAT. ANN. 200/16-180, *as amended by* P.A. 93-0248 (West Supp. 2004) (emphasis added) ("Section 180").[6] The amendment further provides that "the provisions added to this Section by this amendatory Act of the 93rd General Assembly ***shall be construed as declaratory of existing law*** and ***not as a new enactment***." *Id.* (emphasis added).

This statute conclusively proves that the Appellate Court's decision was not a correct application of Illinois

---

[6] As this amendment was proposed legislation, and not law, at the time Lurie filed its Petition before this Court, Lurie did not address it. The amendment became law on July 16, 2004. The amendment does not rectify or render moot the due process violations raised here by Lurie.

law, and that the Illinois Supreme Court erred by refusing to review it. Accordingly, it supports Lurie's contention that the Appellate Court's decision conflicted with existing Illinois case law, the statute creating the PTAB, the Rules of the Cook County Board, and long established practice before both bodies. Therefore, much like the parties in *Brinkerhoff, Jefferson County,* and *Logan* (*See* discussion pp. 3-4, 6 *supra*), Lurie had no prior notice that by failing to raise its state constitutional claim before the Board of Review, it waived it. Moreover, after the erroneous Appellate Court's decision, Lurie had no opportunity to comply with the newly adjudicated law. This constituted a deprivation of Lurie's property right without a proper and meaningful opportunity to be heard, or proper notice of the procedures pursuant to which it would be given the opportunity to be heard.[7]

Finally, the Board argues that no federal question exists because the Appellate Court had an independent state law ground for refusing to consider the Constitutional Ratio issue, namely that Lurie raised the issue in rebuttal, rather than in its original Petition to the PTAB. (Opp. at 17-19.) The Board ignores, however, that the PTAB's Rules expressly allow rebuttal evidence "to explain, repel, counteract or disprove facts given in evidence by an adverse party" pursuant to title 86, section 1910.66(b) of the Illinois Administrative Code ("Section 1910.66(b)") (Conway Greene CD-Rom 2002). (App. at 88.) Here, the Board placed the issue of assessment levels

---

[7] While the Board of Review properly acknowledges the July 16, 2004 amendment of Section 180, it mischaracterizes the changes made to the statute and their effect. (Opp. at 5.) The Board also fails to quote the relevant portions of the amendment stated above, which are in direct contradiction to the Appellate Court's decision and the Board of Review's position. (*Id.*)

at issue in its response to Lurie's Petition to the PTAB. (App. at 22-24.) Lurie was then entitled under Section 1910.66(b) to present rebuttal evidence to "explain, repel, counteract [and] disprove" the issues the Board raised. The PTAB properly considered Lurie's rebuttal evidence in exercising its power to hear both legal and factual issues (App. at 162) and its statutory mandate to render decisions "based upon equity and the weight of the evidence." 35 ILL. COMP. STAT. ANN. 200/16-185 (West 2002).

In sum, the Appellate Court's decision did not rest on properly applied state law, and the Illinois Supreme Court erred by refusing to review it. The Illinois courts' decisions retroactively denied Lurie the opportunity to be heard on a valid and meritorious state constitutional claim. This denial of Lurie's right to be heard directly violated Lurie's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, and the reasons stated in its Petition, The Lurie Company requests that this Court grant its Petition for Writ of *Certiorari*.

Respectfully submitted,

DAVID K. SCHMITT
Counsel of Record
LEONARD W. GOLAN
FIELD & GOLAN LLP
70 West Madison Street
Suite 1500
Chicago, Illinois 60602
(312) 263-2300

Attorneys for Petitioner